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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1016

JOHN H. STAHLIN and PAUL D. BAGWELL,
Petitioners,

vs.

PATRICIA ARBER, et al.,
Respondents.

No. 1021

EVENING NEWS ASSOCIATION and
MARTIN S. HAYDEN,
Petitioners,

vs.

PATRICIA ARBER, et al.,
Respondents.

RESPONDENTS' OBJECTIONS TO ISSUANCE OF WRITS OF CERTIORARI

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TABLE OF CONTENTS

	Page
Index of Authorities Cited	ii
Exhibit A	3
Affidavit of Charles A. Ferry	15
Nature of the Action	25
Reasons Why the Writs Should Not Be Granted	28
I. Question Presented by Petitioners Evening News Association and Martin S. Hayden	28
II. Questions presented by Petitioners John H. Stahlin and Paul D. Bagwell	34
Disputed Questions of Fact	44
Conclusion	44

INDEX TO AUTHORITIES CITED

Associated Press v. Walker (1967) 388 U.S. 130	32, 38
Constitution of Michigan of 1908, Sec. 4, Art I	36
Curtis Publishing Co. v. Butts (1967), 388 U. S. 130; 18 L. Ed. 2d 1094	32, 33, 37, 38
Durant v. Stahlin, 374 Mich. 82 (1964)	14
New York Times v. Sullivan, 376 U. S. 254 (1964)	33
St. Amant v. Thompson, 390 U. S. 727; 20 L. Ed. 2d 262 (1968)	31

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This is not an ordinary case of libel based upon publication of "a newspaper article" by a public newspaper (as claimed in the petition for the Evening News Association and Martin S. Hayden), or based upon an "act undertaken by responsible party leaders in order to investigate charges of improper electioneering" (as claimed in the

petition of John H. Stahlin and Paul D. Bagwell). The petitions and supporting briefs of the Petitioners fail to tell this Court the full circumstances surrounding the genesis of their actions.

The libel actions of the Respondents are based on Exhibit A, which Respondents claim is libelous, and which they claim in their pleadings was jointly and severally prepared and caused to be published, circulated and widely distributed by Petitioners. Exhibit A has not been included in the Appendix of either of the petitions, and nowhere in the briefs of Petitioners is Exhibit A set forth.

The preparation, publication and wide distribution of Exhibit A, the libelous document complained of, were the end result of the actions, joint and several, of Petitioners in furtherance of their plan and/or objective to politically destroy one Richard Durant and those persons (these Respondents) actively associated with him.

Exhibit A, which Petitioners have so studiously omitted —and without which a wholly misleading impression is presented to this Court—is herewith submitted:

EXHIBIT A

Sen. John H. Stahlin
403 Bank of Lansing Bldg.
Lansing, Mich.

Sunday

May 10, 1962

The Rev. Marshall R. Reed, D.D., Chairman
Fair Campaign Practices Commission
1500 Kales Bldg.
70 W. Adams Ave.
Detroit, Mich.

Dear Rev. Reed:

I hereby request that the Fair Campaign Practices Commission conduct, at the earliest possible opportunity, a full-scale investigation into the activities of certain extremists groups in connection with the forthcoming Republican primary election in Wayne County.

Full particulars are detailed in Enclosure A, which is forwarded herewith.

With best personal regards, I am,

Sincerely yours,
John H. Stahlin

CC:

The Rt. Rev. Archie Crowley
The Rt. Rev. Msgr. William J. Flanagan
The Rev. G. Merrill Lenox
Rabbi Leon Fram
Mr. Lester P. Dodd
Dr. Irwin J. Lubbers
Mr. Edward Turner
Mr. Stanley J. Winkelman
Mrs. Josephine Wolas
Mr. Nelson D. Brown

Enclosure A

Sen. John H. Stahlin
403 Bank of Lansing Bldg.
Lansing, Mich.

The Rev. Marshall R. Reed, Chairman
Fair Campaign Practices Commission
1500 Kales Bldg.
76 W. Adams Ave.
Detroit, Mich.

THE BASIC CHARGE:

That certain extremist groups not associated with the Republican Party of Michigan are, through bribery, intimidation, misrepresentation, and threats of physical violence, attempting to seize control of the Republican Party Organization in Wayne County;

That, in order to achieve their aims, these groups are playing upon antisemitic and anti-Negro sentiments; and are, in general, violating every precept of the American tradition of honesty, decency, and fair play;

That the ultimate purpose of this movement is to use the control of the Wayne County Republican Organization to further an extreme political philosophy that is detrimental to the civil liberties of all American citizens;

That the activities of these groups constitute a fascist infiltration of the Republican Party of Michigan that is deplored by all responsible Republican Party members;

That some of the activities of these groups violate existing statutes governing the electoral process; while others, although not illegal, are of a highly immoral and reprehensible character.

Enclosure A—2

PARTICIPATING GROUPS:

Groups participating in this movement include the following:

John Birch Society

George Lincoln Rockwell Inc. (The American Nazi Party)

Sons of America (Linear descendent of the Ku Klux Klan)

Independent America Party

"Durant's Rebels" (A semi-organized group, indigenous to the 14th Congressional District, consisting of the desciples of Mr. Richard Durant, founder of the group.)

Republican Voters Associated (Another 14th Congressional District indigenous group in no way connected with the official Republican Party of Michigan.)

Young Americans for Freedom (A national organization dedicated to extremist views and in no way connected with the Republican Party of Michigan.)

LEADER OF THE MOVEMENT:

The acknowledged leader of this fascist infiltration is Mr. Richard Durant, 523 Penobscot Bldg., Detroit 26, Mich. Although Mr. Durant purports to be a Republican, his philosophy and divisive activities have been denounced by nearly all responsible Republicans. Among other things,

Mr. Durant is a regional leader of the John Birch Society and holds monthly meetings of this clandestine Society in his home.

INDIVIDUALS WITH KNOWLEDGE OF THE MOVEMENT:

The following individuals have first-hand knowledge of this movement, and are listed according to groups with which they have been associated:
Enclosure A—3

JOHN BIRCH SOCIETY

Mr. Richard Durant

AMERICAN NAZI PARTY (George Lincoln Rockwell Inc.)

Mr. George Zimmerman

SONS OF AMERICA (Ku Klux Klan)

Mr. Kent Jennings

INDEPENDENT AMERICA PARTY

Mr. Clive Hull
Mr. John A. Smith

"DURANT'S REBELS"

Mr. Richard Durant
Mr. Truman Castle
Mr. Robert Robbins
Mr. Truman Reed

Mr. Alfred Jackson
Mr. Joseph Bell
Mr. Don Martin
Mr. Edward Patterson
Mr. James Evans
Mr. Finnis Braham
Mr. James Anderson
Mr. William Coash
Mr. John Lane
Mr. Martin Bass

REPUBLICAN VOTERS ASSOCIATED

Mr. Richard Durant
Mr. Rockwell T. Gust Jr.
Mr. Palmer T. Heenan
Mr. Earl Tinseman
Mr. William Crapo
Mr. William Bell
Mr. Charles Grady
Mr. Allen B. Clink
Mr. William Brooks
Mr. Walter Jones

Enclosure A—4

Mr. Walter Morrow
Mr. John Smith

*YOUNG AMERICANS FOR FREEDOM**

Mr. George McDonald
Mr. Al Howell
Mr. Karl Lady
Mr. Gerald Plas
Miss Patricia Arbor

(*NOTE: This group, knowingly or unknowingly, has frequently served as the tool of various facist groups and elements in their effort to infiltrate the Republican Party. Members of this group are at present endeavoring to further their aims through active participation both in the above described movement and in the election campaign of a Republican candidate for state office.)

STRATEGY OF THE MOVEMENT:

The strategy by which these groups are endeavoring to achieve their aims is as follows:

1. Elect a majority of their hand-picked nominees as precinct delegates in each Wayne County congressional district.
2. By electing such a majority of precinct delegates, to control the 1962 congressional district Republican conventions.
3. By controlling the district Republican conventions, to elect one of their hand-picked people as Republican Chairman in each district.
4. To elect their hand-picked candidates as Republican nominees in a majority of the election-contests for Wayne County offices.

5. By electing a majority of such nominees, to elect Mr. Richard Durant as Wayne County Republican Chairman.

FINANCIAL SUPPORT OF THE MOVEMENT:

Financial support for this movement is coming from three principal sources:

1. *Improper use of Republican Party funds:* On February 15, 1962, at the Masonic Temple in Detroit, a fund-raising political rally, featuring Sen.

Enclosure A—5

Barry Goldwater of Arizona, was held, under the sponsorship of the Grosse Pointe Republican Federation of Women's Clubs. The sponsors stipulated that the proceeds were to be devoted to the election of Republican candidates, particularly congressional candidates. Republicans throughout the state bought tickets for this event with the understanding that their donations would be used for such purposes. In fact, however, a significant portion of the proceeds was somehow diverted to Mr. Richard Durant, and is now being used to finance his fascist infiltration of the Wayne County Republican Organization.

2. *Extremist-group sympathizers within Michigan:* Additional funds for Mr. Durant's fascist movement come from private individuals who sympathize with his aims, particularly individuals in Genesse and Berrien Counties.

3. *Sources outside of Michigan:* Remainder of Mr. Durant's financial support comes from extremist-group sources outside of Michigan.

THE TECHNIQUES OF THE MOVEMENT:

The techniques employed by Mr. Durant's fascist infiltration of the Wayne County Republican Organization are vicious, ruthess, immoral, and totally un-American. The most reprehensible techniques include:

1. *The buying of candidates:* Wherever possible, candidates for precinct delegate and/or Wayne County office are obtained by cash payments to individuals to circulate nominating petitions and file for office. In return for this money, these individuals pledge themselves to the support of Mr. Durant's interests. Payments are always made in cash under clandestine circumstances.

2. *Threats of physical violence:* Whenever it serves their purposes, agents of this fascist plot do not hesitate to use open threats of physical violence. In some instances, individuals have been intimidated

by knifepoint. This has created such an aura of terror that witnesses to these actions will testify only under the assurance of complete protection anonymity.

3. *Racism and anti-semitism:* Agents of the fascist plot employ the techniques of bigotry to an incredible degree. This has seriously jeopardized race-relations in several areas. Although the movement is basically anti-Negro, in many instances well-meaning Negro citizens have been manipulated into becoming unwitting tools of a movement that is highly detrimental to the interest of the Negro race.

4. *Tampering with petitions:* Agents of the fascist plot have furthered their aims by stealing and/or invalidating the nominating petitions of candidates opposed to their movement. On April 30, 1962, the nominating petitions of Mr. Grover Leaster, Ward #3, Precinct #11, Detroit, were stolen by Durant storm-troopers.

5. *Telephone intimidation:* Opponents of the fascist plot are constantly intimidated by harassing telephone calls made by a telephone committee of five white women and five Negro women, who have been enlisted in the plot in the belief that they are participating in a noble civil-rights crusade. The names of some of these women will be furnished upon request.

6. *Deceitful literature:* The movement's aims are also furthered through the distribution of false and misleading literature. Following is the text of a bulletin circuated by the American Nazi Party to possible precinct-delegate candidates:

GREETINGS

The George Lincoln Rockwell Delegates Inc. U.S.A. invites you to become a delegate in your precinct to represent your party for purpose of strengthening the party's defense against Communism. The Rockwell Delegates Corp. U.S.A. is a National organization dedicated to defend America against Communism. Consider your patriotic position in your community.

Be a Rockwell Delegate
Non-Partisan Participation

P.S. Watch for further announcements regarding activities in your area.

Enclosure A—7

MEETING PLACES OF THE MOVEMENT:

Groups participating in the fascist plot to seize control of the Wayne County Republican Organization conduct meetings at the following places:

459 Prentiss Ave.
Detroit

382 Pilgrim
Highland Park

4446 Cass Ave.
Office 247
Detroit

932 Edison Ave.
Detroit

Veterans Memorial Building
Detroit

Broadway Market Building
Detroit

IMPLICATIONS OF THE MOVEMENT:

The anti-American implications of this movement are obvious. Not only does it place every valued American freedom in serious jeopardy, but it makes sheer mockery of the Michigan electoral process.

In addition, members of this movement have endeavored to influence important legislation in the Michigan Legislature, through the so-called "Citizens Committee for Fiscal Responsibility," 601 W. Fort St., Detroit. This front-group,

consisting of dupes of the above-named organizations, posed as a statewide movement and flagrantly intimidated members of the Michigan Senate during recent critical tax deliberations.

Enclosure A—8

Furthermore, individuals and groups connected with this fascist movement are supporting at least one candidate for high state office, Mr. Rockwell T. Gust Jr., candidate for the Republican nomination for lieutenant governor. Mr. Gust's consistent refusal to disavow support from these elements casts serious doubts on the integrity of his candidacy.

CORROBORATING WITNESSES:

The allegations contained in this compaint can be corroborated from three major sources:

1. The participants in this movement.
2. Persons who have been intimidated or bribed by agents of the movement, although these persons will testify only under absolute assurance of protection and anonymity.
3. Groups of highly responsible, dedicated, courageous Republican Party members, some of them among the state's most prominent citizens, who have been working to counteract the fascist movement and who will soon come forth with additional disclosures.

SUMMARY:

I have assumed the responsibility of bringing this matter to the attention of the Fair Campaign Practices Commission for two reasons: 1) I am a member of the Republican Party, and this movement poses a grave threat to the integrity of the Republican Party; 2) I am a candidate for state office, and the success of this movement would seriously endanger the Republican Party's prospects in the 1962 elections. In addition, as an American citizen I am outraged by such an anti-American conspiracy.

I submit these disclosures to your Commission in complete confidence that you will take all necessary and proper actions in protecting the public interest.

Respectfully,

Sen. John H. Stahlin

JHS:caf

As can be seen from this amazing document, Exhibit A, Respondents are not just "a party candidate's active supporters with knowledge of improper electioneering, a matter plainly in the public domain. . ." as claimed in the petition for Stahlin and Bagwell; Respondents, *inter alia,* are themselves charged with crimes and felonies.

Mr. Justice Black, of the Michigan Supreme Court, in *Durant v. Stahlin* (374 Mich. 82, 87 (1964)), said,

> * * * "the aforesaid letter was—on its face and upon publication thereof—actionably libelous of Plaintiff if untrue in fact. Such conclusion is not seriously contested by the Defendants-Appellees."

How did this document come to be prepared, published and widely distributed?

One of the defendants in the cases at bar, Charles A. Ferry (the "caf" on the bottom of Exhibit A) made an affidavit which was filed in opposition to Petitioners' motions for summary judgment in the lower court in Michigan. Although self-serving in part, the affidavit of Ferry strips away the pretense maintained by Petitioners that Exhibit A was prepared in good faith.

So that the story of the preparation, publication and wide distribution of Exhibit A will be clear to this Court at the outset, this Ferry affidavit is herewith presented:

AFFIDAVIT OF DEFENDANT CHARLES FERRY

State of Michigan,
County of Wayne—ss.

Charles Ferry, being duly sworn, deposes and says:

That he is one of the defendants in the above entitled cause, and that he has testified on deposition to some of the matters involved in the above cause; that if sworn as a witness, he can testify competently to the facts contained in this affidavit.

That during the spring and summer of 1962 deponent was in charge of the publicity on behalf of defendant John Stahlin, who was a candidate for the office of Lt. Governor on the Republican ticket for the State of Michigan, and that in the course of this duty he was in close and constant communication with defendant John Stahlin.

That prior to May 10, 1962, defendant Stahlin told deponent that he had conversations and discussions with various Party leaders and others, including Bill Kulsea of

the Booth Newspapers, who had recommended to defenant Stahlin that he go after Richard Durant and attack him publicly.

That defendant Stahlin informed deponent that Stahlin had talked to Martin Hayden, editor of the Detroit News, at the office of the News, and was told that if said Stahlin would make a public attack against Richard Durant, he would have the editorial support of The Detroit News in his campaign for Lt. Governor; that the first test for the News' support was the candidate's position on Durant, that such a public attack against Durant would help get rid of Durant in the 14th Congressional District, and therefore The News would support said Stahlin; that with this *quid pro quo* in mind, this deponent and defendant Stahlin began to get serious about taking some action as suggested.

That deponent and defendant Stahlin then began to accumulate information which could be used in an attack on Richard Durant, and that deponent talked to Richard Van Dusen, Norman Stockmeyer, Elly Peterson, Jack Gibbs, Donald DeRosen, Glenn Engle and others to get such information and to see what their reactions were to such an attack.

That prior to writing Exhibit A, deponent talked to Glenn Engle of the Detroit News, and informed him that defendant Stahlin would in the future be making some sort of attack against Durant; that Engle then requested that the Detroit News be given a "beat" on it because it "was the only paper which was really after the Durant thing;" and that a determining factor in deponent's decision to write Exhibit A was the knowledge that The Detroit News would give defendant Stahlin editorial support if he made the public attack.

That deponent knew defendant Stahlin was under pressure from the Detroit News and others in the Republican Party to take this action against Durant; that deponent had frequent discussions with Glenn Engle and other representatives of The Detroit News—for example, Robert Poppa, Carl Rudow and Will Muller—and knew of Martin Hayden's attitude toward Richard Durant; that deponent knew from his conversations with Elly Peterson, Richard Van Dusen, Jack Gibbs, Norman Stockmeyer, Donald DeRosen and others that defendant Stahlin would get the support of the "Romney crowd" if there was considerable publicity attached to his name in the publicity of these charges to be made against Richard Durant.

That the subject of the attack, and the gossip to be used to make this attack (which later took the form of Exhibit A) were discussed by deponent with Elly Peterson, Norman Stockmeyer, Jack Gibbs, Donald DeRosen, Richard Van Dusen, Herman McKinney, Paul Bagwell, Glenn Engle, and others in the Republican Party, including then State Senator Stanley Thayer; that all of the above, with the possible exception of Stanley Thayer, confirmed the accuracy of the gossip which was later used in Exhibit A; that all of them recommended that the attack on Richard Durant be made; and that Glenn Engle was compiling a file on all these things, the existence of which was another factor in deponent's decision to write Exhibit A.

That the strategy of using a complaint with the Fair Campaign Practices Commission to make the attack was specifically approved of by Jack Gibbs, Elly Peterson, Glenn Engle and Paul Bagwell and Norman Stockmeyer.

That at some of deponent's regular meetings with defendant Stahlin in April, 1962, it was known and discussed

that someone from the Ford Motor Company had gone down to Washington to induce Senator Barry Goldwater to denounce Richard Durant so that Durant would be cut off from the certain amount of respectability that being a supporter of Goldwater then had, and that this effort was undertaken as a planned part of the attempt to oust Durant from his position of leadership in the Republican Party in the 14th District, which resulted eventually in the publication of Exhibit A; that prior to May 10, 1962, at some of the "dump Durant" meetings in Lansing with defendant Stahlin and others, the "word" was out that Allen Merrill, a Vice President of the Ford Motor Company, had said to "get" Durant.

That on Thursday, May 10, 1962, deponent and defendant Stahlin had a meeting with Paul Bagwell at the office of Paul Bagwell in the Penobscot Building in Detroit, which lasted an hour to an hour and a half; that the primary purpose of the meeting was to get the advice of Paul Bagwell on the desirability and wisdom of making a public attack against Richard Durant; that deponent and defendant Stahlin knew that Bagwell was leading a group in the 14th District to oust Richard Durant; that the meeting discussed the situation in the 14th District in relation to ousting Durant; that Bagwell confirmed the accuracy of the information deponent and defendant Stahlin had been compiling and told them of the activities of his group, the Republican Action Committee; that Paul Bagwell said his group was also compiling information about Richard Durant; that Bagwell gave, without a request on the part of deponent or defendant Stahlin, certain documents which were used in Exhibit A; that Bagwell was extremely enthusiastic about the plan to attack Durant through the Fair Campaign Practices Commission and said "This

would be a good thing for the Party and our efforts (in the 14th District) and a good thing for you, John."

That at this meeting Paul Bagwell said that this proposed attack through the FCPC had "good possibilities" and it would help his group in their job of ousting Durant in the 14th District; that certain members of the Republican Action Committee (including George Bashara, Jr. and John Feikens) were digging on their own to get more of this sort of information to use in an attack on Richard Durant; that Bagwell strongly urged deponent to talk to said Bashara and Feikens before deponent made his public attack because they had additional charges "to scorch your hair", but that deponent did not talk to them because he had to get Exhibit A written in time to get it published in the Detroit News on Sunday, May 13, 1962.

That deponent and defendant Stahlin believed the information given them by Paul Bagwell; that Bagwell told them his group would continue to investigate Durant and would come out with a further attack of their own subsequent to the publication of Exhibit A, consisting of further disclosures of wrong-doing by Durant; that the purpose of these further disclosures, on the heels of Exhibit A, was to give it "the old one, two"; that the information deponent and defendant Stahlin had, which Bagwell confirmed, was already in the possession of George Bashara, Jr., and John Feikens, who were working on still more things; that deponent had certain notes of the gossip he had heard from others which he discussed at this meeting with Paul Bagwell, which Bagwell confirmed, and which was later used in Exhibit A.

That Bagwell, in his meeting and conversation with deponent and defendant Stahlin, was acting as a spokesman

for the Republican Action Committee and his organized effort to oust Durant; that he consistently used the word "we" in his references to the proposed attack and the efforts being made in conjunction with deponent's proposed disclosures; that Bagwell informed deponent and defendant Stahlin that it was "a nasty situation" and "something had to be done about it" and "we are right behind you"; that going through the FCPC was much better than getting up on a podium or issuing a press release denouncing Durant, that this procedure lent it a little more dignity and substance and gave it a structure for the charges to be aired; that the action deponent and defendant Stahlin were proposing was consistent with what the Republican Action Committee was doing in the 14th District and that it would help the Republican Action Committee with their job; that the said Bagwell was the acknowledged leader of the anti-Durant-conservative movement in the 14th District; that in this meeting Bagwell made reference to the fact that he was working with others to accomplish their joint purpose of ousting Durant by attacks on Durant such as Exhibit A; and that the material Bagwell gave deponent and defendant Stahlin was to be used as they saw fit, without any strings on it or requests having been made for it.

That Bagwell assured deponent and defendant Stahlin they had the support of Bagwell and his associates in the publication and dissemination of the attack which later took the form of Exhibit A, and that the Republican Action Committee would "soon come forth" with additional disclosures of the same sort.

That when deponent left Bagwell's office, after this meeting on May 10, 1962, he had no doubt whatsoever in his mind, as a result of the conversation with Bagwell, that

the plans of deponent and defendant Stahlin to make the attack on Durant through Exhibit A would be relayed by Bagwell to other members of the Republican Action Committee and other people, not formally members of RAC but interested in seeing such an attack made.

That Bagwell was most enthusiastic, as a spokesman for his group, that somebody like deponent and defendant Stahlin were trying to "flush out" Durant through such disclosures as were used in Exhibit A; that this would be very beneficial to the interest of Bagwell's group; that in the area of disclosing information to deponent and defendant Stahlin, Bagwell was speaking for his group.

That subsequent to leaving Bagwell on May 10, 1962, deponent returned to Lansing and wrote Exhibit A, using material from the following sources:

> From Paul Bagwell—almost all of pages 2 and 3; forthcoming additional disclosures; improper use of Party funds; racism and anti-Semitism; telephone intimidation; tampering with petitions; deceitful literature; meeting places and individual names; corroborating witnesses; general confirmation of all other items.
>
> From Glenn Engle—threats of physical violence, including the knife point incident; racism and anti-Semitism; corroborating witnesses; buying of candidates; general confirmation of all other items.
>
> From Donald DeRosen—threats of physical violence; improper use of Party funds; buying of candidates; tampering with petitions.
>
> From Herman McKinney—threats of physical violence; intimidation; racism and anti-Semitism; corroborating witnesses.

From Jack Gibbs—buying of candidates; improper use of Party funds; general confirmation of all other items.

From Norman Stockmeyer—improper use of Party funds; threats of physical violence; buying of candidates; tampering with petitions; general confirmation of all other items.

From nearly every facet of Party leadership not heretofore mentioned—general confirmation of most if not all items. (By Party leadership, deponent means a series of continuing conversations with individuals mentioned herein and others who expressed their alarm over the possibility of Richard Durant becoming Chairman of Wayne County and supplied or confirmed gossip used in the preparation of Exhibit A).

That Paul Bagwell, at the meeting with deponent and defendant Stahlin hereinabove referred to, said that he had turned the information he presented to them over to George Romney and had urged Romney to make the disclosures earlier, but that Romney had refused, which refusal Bagwell characterized as an error, and that the reason Bagwell gave the material to deponent and defendant Stahlin was that it would help Bagwell and his associates in their coordinated and formally organized and sophisticated efforts to oust Durant from his position in the 14th District.

That after writing Exhibit A on the night of Thursday, May 10, 1962, deponent delivered copies to defendant Stahlin in the early morning of Friday, May 11, 1962, and then went directly to see Glenn Engle at the offices of The Detroit News; that an overriding consideration in writing Exhibit A was to get publicity; that it was the concensus of deponent, Paul Bagwell and others that using the ap-

peal to the Fair Campaign Practices Commission was a matter of publicity mechanics; that this was the most beneficial route to follow in terms of defendant Stahlin's position as a candidate; that filing charges before a government body is an event which was newsworthy, that deponent did not intend to, nor did he, mail a copy of the complaint to the Fair Campaign Practices Commission until after he had "cleared" the timing with The Detroit News and made sure "the skids were greased" there; that he wanted the Sunday circulation for the airing of the charges and would have held off making the charges public if The Detroit News could not have given him space that day; that he made the charges public when he did because the newspaper strike had just ended—there was no point in taking action if the papers were not publishing; and that defendant Stahlin, Glenn Engle and the Detroit News were aware of these factors in his decision to make the charges at this time.

Deponent further says that when he presented Exhibit A to Glenn Engle, Engle skimmed over it and said, "I had better check with the head man on this" indicating to deponent that the decision as to whether to publicize it was too weighty for him to make alone; that Engle then took Exhibit A to Martin Hayden, and that shortly thereafter deponent was also brought by Engle into Hayden's office; that Hayden released deponent from "our" exclusive, saying he wanted this story to have the widest possible publicity—"You are free to distribute this to other media"; and that deponent did not mail a copy of Exhibit A to the Fair Campaign Practices Commission until after he had left a copy or copies with The Detroit News.

That copies of Exhibit A were mimeographed prior to deponent's visit to Glenn Engle aforesaid, and that after deponent's visit to the Detroit News, he gave copies to

the Associated Press, United Press and The Detroit Free Press; that at least one copy was given on that Friday, May 11, 1962, prior to the appearance of the story about the charges on Sunday, May 13, 1962, to one Sarah Luedders (who had no connection with any news media) in the expectation that it would find its way into Durant's hands; that the rest of Friday and Saturday were spent in distribution of copies; that after Sunday, May 13, 1962, copies were given to a "standard" PR mailing list, and to other individuals not connected with news media who requested copies, including members of the Republican State Central Committee; and that deponent was aware by Sunday, May 13, 1962, that Bishop Marshall Reed, the Chairman of the Fair Campaign Practices Commission, had not received any copies of Exhibit A by that day, and mailed him additional copies so that the FCPC received its copy well subsequent to May 13, 1962.

That this widespread distribution, including the distribution to The Detroit News, was with the approval and knowledge of defendant Stahlin.

That subsequent to the publication of Exhibit A, deponent was informed by Arthur Elliott that it would be okay for him to use the threat of action by the Banking Commissioner against Durant; that a suit was started against Durant in Newberry, Michigan, which was publicized; that prior thereto, deponent was informed by Paul Bagwell that there would be some sort of action forthcoming regarding Durant's personal business transactions; and that defendant Stahlin informed deponent that Charles Slay, the Banking Commissioner, was in touch with defendant Stahlin, giving Stahlin information about Durant's personal business dealing with various banks of which Durant was a director, and had informed defendant Stahlin

that the Banking Department was also "going to get" Durant.

And further deponent saith not.

Charles Ferry

Subscribed and sworn to before me this 4th day of April, 1966.

Nell M. Yorgan
Notary Public, Wayne County, Michigan
My commission expires September 20, 1969

NATURE OF THE ACTION

For a clear statement of the nature of the action, we can do no better than to quote from the opinion of the Michigan Supreme Court in *Arber v. Stahlin,* et al, 382 Mich. 300 (1969):

> "This appeal is from orders of the circuit court granting motions for summary judgments as to defendants, The Evening News Association, Martin S. Hayden, Paul D. Bagwell, and John H. Stahlin. The motions arose in six cases which were consolidated by order of the Court of Appeals. The summary judgments were affirmed by that Court.
>
> "The original complaints in the six cases before us were filed in May, 1963. They arose out of a conflict between the plaintiffs, who were supporters of one Richard Durant, and certain leaders of the Republican Party in Michigan, who allegedly were attempting to oust Durant from a position of influence within the party. The alleged libel was contained in a letter dated May 10, 1962, with an enclosure, mailed by then State Senator John H.

Stahlin to the Michigan fair campaign practices commission, charging plaintiffs with improper activities.

"Plaintiffs charge that the above circulated documents were libelous in that the statements made, and the natural inferences to be drawn therefrom, charged the plaintiffs with being members of and/or associated with groups and/or persons whose activities were detailed as consisting of bribery, diversion of party funds, intimidation, misrepresentation, threats of physical violence, anti-Semitism, anti-Negro sentiments, violation of the American tradition of honesty, decency and fair play, and Fascist, immoral and reprehensible conduct.

"Defendants filed their several motions for summary judgments.

"The motions of defendants The Evening News Association and Martin S. Hayden were based upon: (1) Claimed privilege in the matter of 'transmission of Senator Stahlin's letter and enclosure of May 10, 1962, to the chairman of the fair campaign practices committee with copies to the members of said committee and to the press.' (2) The publication by The Evening News Association of May 13, 1962, was privileged as a matter of law under the First and Fourteenth Amendments to the United States Constitution, and under the Michigan Const. 1963, art 1, §§3 and 5,[1] as being a matter of broad and general public interest. (3) The article did not name the plaintiffs and did not concern or libel plaintiffs as a matter of law. (4) There was no genuine issue as to any material fact and the undisputed facts show that defendants The Evening News Association and Martin S. Hayden did not act

[1] Since the acts complained of occurred in May, 1962, Const 1908, art 2, §§2 and 4, were applicable.

with actual malice toward plaintiffs. Attached to the motions were the affidavits of Frederick G. Engle, political writer for The Detroit News, and Martin S. Hayden, editor of The Detroit News. These affidavits, together with other affidavits hereafter mentioned, are contained in the appendix to this opinion.

"The motions for summary judgments, with supporting affidavits, filed by defendants John H. Stahlin and Paul D. Bagwell relied upon GCR 1963, 117.2(3), alleging that there was no genuine issue as to any material fact in the action because the publication of the statements complained of was privileged and such statements were not libelous of the plaintiffs.

"In answer to the several motions for summary judgments, plaintiffs filed the affidavit of defendant Charles Ferry.

"The motions for summary judgments were granted and orders were entered in the various cases on behalf of each of the defendants.

"Plaintiffs appealed to the Court of Appeals. The Court of Appeals affirmed the grant of summary judgments 'for the reason that plaintiffs have failed to raise a genuine issue of fact as to the element of malice.' 10 Mich. App. 181, 188."

The Michigan Supreme Court then properly reversed the lower courts which had granted summary judgments adverse to the Respondents. Petitioners applied for a rehearing, which was denied. Petitioners then filed their petitions for certiorari.

REASONS WHY THE WRITS SHOULD NOT BE GRANTED

The briefs of Petitioners are based upon three false premises, to wit:

1. That the causes of action against the Petitioners arise only from the filing of a complaint with a civic committee, and a newspaper article reporting and summarizing that action.
2. That the Respondents were public persons.
3. That no issues of fact were raised.

Each one of those three premises is without foundation in fact.

I.

QUESTIONS PRESENTED BY PETITIONERS EVENING NEWS ASSOCIATION AND MARTIN S. HAYDEN

1. That the Times standard should apply to "libel actions brought against a public newspaper and its Editor as to their accurate newspaper reporting of matters of political controversy."

This libel action was *not* brought against these Petitioners because of their "reporting of matters of political controversy." It was brought because of the preparation, publication and wide distribution of Exhibit A, in which both the Evening News Association and Martin S. Hayden, its Editor, participated.

The affidavit of Charles A. Ferry makes plain that:

(a) Petitioners encouraged the preparation of Exhibit A.

(b) Petitioners put "pressure" on to publish Exhibit A.

(c) Petitioners supplied material used in Exhibit A.

(d) Petitioners promised editorial support if Exhibit A were published, which commitment was carried out.

(e) Petitioners requested a "beat" on Exhibit A. Later Hayden expressly waived " 'our' exclusive, saying he wanted this story (Exhibit A) to have the widest possible publicity . . ."

(f) " . . . a determining factor in deponent's decision to write Exhibit A was knowledge" of the promised editorial support.

(g) Petitioners "specifically approved" the "strategy" of using the Fair Campaign Practices Commission to make the attack, and later " 'clear' the timing" of the release of Exhibit A.

The libel action is not in any way based on the stories run in The Detroit News or The Detroit Free Press. Therefore the first question presented is entirely irrelevant.

2. That a state should not "accord such libel actions to individual members of large political groups who were not in any way named, described or identified in the newspaper report involved . . ."

Again, we repeat, this libel action was *not* brought against these Petitioners because of "the newspaper report involved." It is true that Respondents are not mentioned in the newspaper report. But the libel action is brought upon Exhibit A—and Respondents are "named, described or identified" in Exhibit A.

Exhibit A is "of and concerning" Respondents, and did "accuse them of 'personal involvement in the acts in question.' "

Therefore the second question presented is also entirely irrelevant.

3. That a state should not be able to "direct such libel actions be continued through jury verdict solely because plaintiffs have alleged Times malice."

The Michigan Supreme Court did *not* direct continuation through verdict "solely" because plaintiffs have alleged *Times* malice. What the Court said was, " . . . we cannot agree with the conclusion that there is no question of fact as to ' "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.' " (*Arber v. Stahlin,* Petitioners' Brief, p. 53a.)

There is a world of difference in the two propositions.

And the Michigan Court, after reviewing the Ferry affidavit went on to say,

> "From these and other facts disclosed by the record, we find that reasonable minds could find or reasonably infer that the document (Exhibit A) was prepared and published with an intent to cause harm through falsehood or in reckless disregard of the truth or falsity of the allegations. . . . This creates a typical jury question." (Petitioners' brief, p. 55a)

A footnote at this point in the Court's opinion says:

> "We note with great interest that it is more than mere coincidence that the Federal authorities have consistently, under both the *New York Times Co. v. Sullivan* and *Curtis Publishing Co. v. Butts* stad-

ards, refused to grant summary judgment (citing authorities) or reviewed the case only after a full trial was held (citing authorities." (Petitioners' brief, p. 55a, 56a.)

And this Court, in *St. Amant v. Thompson*, 390 U.S. 727; 20 L. Ed. 2nd 262 (1968), supports this contention. In that case there was a trial upon the merits. This Court, on pages 267 and 268, said:

> *"The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports."* (emphasis ours)

In the cases at bar there were no trials on the merits to enable "(t)he finder of fact (to) determine whether the publication was indeed made in good faith."

Petitioners make much of the Michigan Supreme Court's reference to "hot news" and of what Petitioners call the "public's paramount right to be fully informed." Let us look at what the Court actually said.

> "The record indicates that defendants had complete control over releasing the news (it is Exhibit A which is here referred to) and that they could

> have released it (Exhibit A) at any time. We observe, however, that it (Exhibit A) was not 'hot news' requiring immediate dissemination as in *Associated Press v. Walker,* 388 U. S. 130, 157; (87 S Ct 1975; 18 L. Ed. 2nd 1094), but rather the type of news which by its very nature requires close scrutiny and careful verification (see *Curtis Publishing Co. v. Butts* (1967), 388 U.S. 130 (87 S Ct 1975, 18 L. Ed. 2nd 1094)," (Petitioners' Brief, p. 55a)

Was "the public's paramount right to be fully informed" being served when, according to Ferry's affidavit, Petitioners immediately "cleared" Exhibit A—or was it the interest of Petitioners?!

4. That due process and equal protection are violated if Petitioners are not granted "summary judgment procedure, including those benefits previously accorded their co-defendant in these same actions."

Petitioners point out that a co-defendant was granted summary judgment in *Zimmerman v. Stahlin* (374 Mich. 93). But they neglect to state that the Ferry affidavit was not then available and did not form a part of that record.

And it is largely on this affidavit that the Michigan Supreme Court based its findings in the cases at bar.

"Viewing all of the conflicting representations in the affidavits, could not a jury find or reasonably infer that defendants intended solely to 'get Durant' and that they were not in the least concerned with plaintiffs, who were virtual anonymities in the political area, or with the true facts regarding their participation in the Durant campaign? Could not a jury also find or reasonably infer that the hurried publication of the allegedly libelous docu-

ment (Exhibit A) was indicative of a reckless disregard of whether it was true or not?" (Petitioners' brief, p. 55a)

Petitioners were not deprived of equal protection. Evidence was available in their case which was not available earlier. The cases are different, and were judged on a different foundation.

Moreover, Ferry's affidavit (self-serving in part though it is) at the very least calls into question Petitioner's argument that they "published without knowledge of falsity and in reliance upon the integrity of the candidate who sponsored the charges," for Ferry states explicitly that Petitioners encouraged participation, supplied material, promised support if the attack were made, requested a "beat" and then waived it so as to get the widest possible distribution, put pressure on to have the attack of Exhibit A made, and "specifically approved" the strategy and timing of the publication of Exhibit A.

How could they rely "on the integrity of the candidate", Petitioner Stahlin, when they themselves were so closely involved?!

It is not that "Petitioners' affidavits are inherently insufficient"—it is simply that the Ferry affidavit, at the least, casts doubts on their truthfulness; at the worst, it refutes them absolutely.

There has been no self-censoring effect of protracted litigation. As this Court said in *Curtis Publishing Co. v. Butts,* 388 U.S. 130; 18, L. Ed. 2nd 1094, 1097:

> *"The publisher of a newspaper has no special immunity from the application of general laws.*
>
> "Our resolution of *New York Times Co. v. Sullivan* in the context of the numerous statutes and cases which follow ideologically neutral, and gen-

> erally applicable regulatory measures to be applied to publication, makes clear, however, that *neither the interest of the publisher nor those of society necessarily preclude a damage award based on improper conduct which creates a false publication. It is the conduct element, therefore, on which we must principally focus* if we are successfully to resolve the antithesis between civil libel actions and the freedom of speech and press. Impositions based on misconduct can be neutral with respect to content of the speech involved, free of historical taint, and adjusted to strike a fair balance between the interests of the community in free circulation of information and those of individuals in seeking recompense for harm done by the circulation of defamatory falsehood." (emphasis ours.)

Is Petitioners' conduct proper, in the light of the Ferry affidavit?!

II.

QUESTIONS PRESENTED BY PETITIONERS JOHN H. STAHLIN AND PAUL D. BAGWELL

1. That due process was violated because summary judgment was not granted when "plaintiffs had failed to approach the issue of 'actual malice.'"

By reference to the decision of the Michigan Supreme Court, as set out in Petitioners' brief, beginning on page 44a, continuing through page 45a (and footnote 4), 46a, 47a; and concluding on 48a, it is immediately apparent that the Michigan Court applied the *Times* standards. It determined that this case did not meet those requirements because there was a question of fact as to "actual malice" and because the Respondents were not "public persons" within the meaning of the *Times* standards as set by this Court.

Everything said in the previous section concerning Petitioners Evening News Association and Martin S. Hayden about improper conduct and the question of fact as to malice, derived from the Ferry affidavit and the record, applies with equal force here.

Self-serving though Ferry's affidavit is in part, a reading of it shows clearly that it flatly contradicts portions of the affidavits of Petitioners.

2. That granting summary judgment, to "test whether or not further proceedings are really warranted," is necessary because of "the chilling effect such litigation may have upon the free exercise of the First Amendment rights."

Petitioners alleged that "libel litigation provides the basis for a potential harassment technique in the hands of private censors who may desire to silence criticism of the electoral process or its participants."

Exhibit A is *not* a "criticism of the electoral process or its participants." It is "of and concerning" Respondents, and it accuses them of "personal involvement in the acts in question." These acts are not "improper electioneering," as Petitioners allege several times; these acts include crimes and felonies.

(It might be asked, what "chilling effect" there would be upon innocent persons seeking to become active in any civic activities if they find they can be libeled and slandered and their good characters and reputations impugned, or even destroyed, by persons recklessly and maliciously disseminating libelous accusations, claiming privilege and seeking to cloak themselves in the First Amendment?)

Mark some of the items in the Ferry affidavit, as to whether "further proceedings are really warranted."

Petitioner Bagwell submitted material ("without any strings on it," according to Ferry) which was used in Exhibit A, which in turn was to be used as part of the attack on Durant; Petitioner Stahlin was the ostensible author of the document; it was to be sent to the Fair Campaign Practices Commission as a subterfuge or coverup to give it the authenticity for publication; its contents were to be used to help Petitioner Bagwell politically in his Congressional District (and in fact were so used), not just for investigation by the Fair Campaign Practices Commission; it was to help Petitioner Stahlin win support from others in his race for political office, not just for investigation by the Fair Campaign Practices Commission.

It was not "fair comment"; it was not done in good faith. It was utilized, gathered, and published widely in order to achieve a pre-conceived plan to politically destroy Durant. And in the process, as the Michigan Supreme Court said, ". . . could not a jury find or reasonably infer that defendants intended solely to 'get Durant' and that they were not in the least concerned with plaintiffs, who were virtual anonymities in the political area, or with the true facts regarding their participation in the Durant campaign? Could not a jury also find or reasonably infer that the hurried publication of the allegedly libelous document was indicative of a reckless disregard of whether it was true or not?" (Petitioners' brief, p. 46a and 47a.)

Are the "virtual anonymities" to be trampled with boots fashioned from the First Amendment?

The Constitution of 1908 of the State of Michigan clearly recognizes the possibility of the abuse of the right of free speech. Section 4 of Article I provides,

> "Every person may freely speak, write and publish his sentiments on all subjects, *being responsible for the abuse of such right;* and no law shall be

> passed to restrain or abridge the liberty of speech or of the press." (Emphasis ours.)

This recognition of the possible abuse of the right to free speech and free press is again demonstrated by Section 5, Article I of the 1963 Michigan Constitution in substantially the same words.

The First Amendment to the United States Constitution was certainly not intended to protect schemes such as the one the Ferry affidavit describes, by which innocent people are damaged and the cloak of pretended privilege is assumed as "a matter of publicity mechanics." This Court, speaking in *Curtis Publishing Co. v. Butts,* 18 L. Ed. 2nd 1094, on page 1107 said:

> "On the other hand, to take the rule found appropriate in *New York Times* to resolve the 'tension' between the particular constitutional interest there involved and the interests of personal reputation and press responsibility, *Rosenblatt v. Baer, supra* 383 U.S. at 86 (15 L. Ed. 2nd at 605), as being applicable throughout the realm of the broader constitutional interest, would be to attribute to this aspect of *New York Times* an unintended inexorability at the threshold of this new constitutional development."

And on page 1108:

> "The fact that dissemination of information and opinion on questions of public concern is ordinarily a legitimate, protected and indeed cherished activity does not mean, however, that one may in all respects carry on that activity exempt from sanctions designed to safeguard the legitimate interests of others."

On page 1109 and 1110 this Court goes on to emphasize conduct, saying:

> *". . . neither the interest of the publisher nor those of society necessarily preclude a damage award based on improper conduct which creates a false publication. It is the conduct element, therefore, on which we must principally focus . . ."* (Emphasis ours.)

By what standards can Petitioners' conduct be described as proper?!

3. That the Times standard should apply to people "with knowledge of improper electioneering activities—matters of pressing public controversy—even in the absence of a showing that such supporters are widely known in the community."

In essence, Petitioners are saying that anyone who takes part in the election process—or even has knowledge of "pressing public controversy"—is a public person.

First, the Michigan Supreme Court, as set out in the fifth paragraph of page 46a of Petitioners' brief, states that "it (Exhibit A) was not 'hot news' requiring immediate dissemination as in *Associated Press v. Walker* (1967), 388 U.S. 130, 157 (87 S. Ct. 1975, 18 L. Ed. 2nd 1094), but rather the type of news which by its very nature requires close scrutiny and careful verification (see *Curtis Publishing Co. v. Butts* (1967), 388 U.S. 130 (87 S. Ct. 1975, 18 L Ed 2d 1094)."

Second, the Michigan Court in footnote 4 on page 45a of Petitioners' brief said in part, on this issue of public persons, "Nothing in the record indicates that plaintiffs were in fact 'public figures.' In fact, defendant Hayden, who was the editor of the newspaper that published the alleged libel (sic), and who was certainly in the best position to know the identities of 'public persons' in the community,

deposed that he 'was not acquainted with plaintiff herein.' We cannot agree with the circuit judge's facile reasoning that 'some (of the plaintiff) may have been, were or are precinct delegates' and thus 'a public person.' This reasoning is unsupported by the proofs necessary to make such a finding of fact and is, at best, a conclusionary observation."

Petitioners apply the strange argument that, because debate on public issues should be widespread, and such debate is therefore in the public domain, all those active in public issues (*no matter how slightly*) are themselves in the public domain and therefore public persons. Even knowing a public matter would make one a public person!

4. That "vitriolic . . . charges of improper electioneering, the hurried publication thereof, and the possibility that a jury might disbelieve testimony" is insufficient to establish a question of fact as to actual malice.

In their argument Petitioners refer to "criticism of public figures," thus cheerfully deciding question 3, supra, in their own favor.

Furthermore, Exhibit A is not "criticism"; it is accusation of crime.

The Michigan Supreme Court did *not* say that those three items would bar a summary judgment. What it said (p. 48a of Petitioners' brief) was, "We hold that where, as here, the credibility of a witness or deponent is crucial, summary judgment should not be granted."

And the credibility of the Petitioners (all four of them) is crucial. Let us look briefly at just one item in each affidavit for the Petitioners.

Engle

(An employee of Petitioner Evening News Association, on p. 49a of Petitioners' brief)

"The only action taken by any of us was to publish, on Sunday, May 13, 1962, the attached Detroit News article concerning the request and complaint and Mr. Durant's comments thereon."

Ferry

(On p. 62a of Petitioners' brief says Engle gave him information which was included in Exhibit A)

"From Glenn Engle—threats of physical violence, including the knife point incident; racism and anti-Semitism; corroborating witnesses; buying of candidates; general confirmation of all other items."

Hayden

(On p. 50a of Petitioners' brief)

"The only action taken by The Detroit News, Mr. Engle, or myself was the publication on May 13, 1962, of a news article written by Mr. Engle concerning Senator Stahlin's request and complaint and Mr. Durant's comments thereon."

Ferry

(On p. 58a of Petitioner's brief)

"That defendant Stahlin informed deponent that Stahlin had talked to Martin Hayden, editor of The Detroit News, at the office of the News, and was told that if said Stahlin would make a public attack against Richard Durant, he would have the editorial support of The Detroit News in his campaign for lieutenant governor . . ."

Stahlin

(On p. 52a of Petitioners' brief)

". . . . I believed it to be my duty to communicate this information to and file a complaint with the members

Ferry

(On p. 63a of Petitioners' brief)

". . . . that an overriding consideration in writing exhibit A was to get publicity; that it was the consensus of

of the Michigan Fair Campaign Practices Commission . . ."

deponent, Paul Bagwell and others that using the appeal to the fair campaign practices commission was a matter of publicity mechanics; that this was the most beneficial route to follow in terms of defendant Stahlin's position as a candidate; that filing charges before a government body is an event which was newsworthy, that deponent did not intend to, nor did he, mail a copy of the complaint to the fair campaign practices commission until after he had 'cleared' the timing with The Detroit News and made sure 'the skids were greased' there; that he wanted the Sunday circulation for the airing of the charges and would have held off making the charges public if The Detroit News could not have given him space that day; that he made the charges public when he did because the newspaper strike had just ended—there was no point in taking action if the papers were not publishing; and that defendant Stahlin, Glenn Engle and The Detroit News were aware of these factors in his decision to make the charges at this time."

Bagwell	*Ferry*
(On p. 54a of Petitioners' brief)	(On p. 61a of Petitioners' brief)
"Deponent had no knowledge that defendants Stahlin and Ferry or any other person intended to or would publish the contents of said documents other than as set forth above (to go to the Fair Campaign Practices Commission for investigation only); he did not authorize publication other than as set forth above; and he delivered said documents solely for the purpose of having such allegations investigated by the fair campaign practices commission, duly constituted for such purpose."	". . . . that in this meeting Bagwell made reference to the fact that he was working with others to accomplish their joint purpose of ousting Durant by attacks on Durant such as Exhibit A; and that the material Bagwell gave deponent and defendant Stahlin was to be used as they saw fit, without any strings on it or requests having been made for it."

We could fill pages with similar flat contradictions.

Is it any wonder that the Michigan Supreme Court found a credibility gap?!

5. That the First and Fourteenth Amendments bar liability for a civil libel suit against "the leaders of a political party who receive and transmit to a Fair Campaign Practices Commission reports of improper electioneering activities and the names of persons who are believed to have knowledge of them."

The Petitioners falsely imply that their only publication of the libel was the filing of a complaint with a civic committee.

In fact, as Ferry's affidavit states in part, mimeographed copies of Exhibit A were delivered to individuals, to other news media, and "to a 'standard' PR mailing list," as well as to members of the Republican State Central Committee.

Furthermore, Ferry's affidavit (p. 61a of Petitioners' brief) shows plainly that the mailing of the complaint to the civic committee was "a matter of publicity mechanics," a device to add "dignity and substance" and call attention to the false charges.

It is Respondents' position that even where a Court finds a qualified privilege to exist, after there have been proofs presented in a trial to establish the qualified privilege, or where the question of qualified privilege is not disputed, there is still the question to go before the trier of the facts as to whether that qualified privilege has been abused.

The question of whether qualified privilege attaches depends upon the occasion of the publication. What was the occasion in the cases at bar?

The Ferry affidavit clearly shows the occasion was created for the purpose of getting publicity to aid Petitioners in their efforts to "get Durant". Respondents have a right to have a jury pass on abuse of privilege under such circumstances, as a result of which they suffered damage.

DISPUTED QUESTIONS OF FACT

Questions of fact, disputed between the representations of the various affidavits and the pleadings herein, are clearly—

(a) The question of the abuse of qualified privilege, if in fact qualified privilege existed at all.

(b) The question of the existence of malice. The content of Exhibit A and the occasion of its preparation, publication and widespread distribution are such that malice can reasonably be inferred if it is shown that the accusations made therein are not true. Certainly, if untrue, the charges were made with reckless disregard of their truth or falsity, and with intent to injure the persons named therein.

(c) The question of truth. Petitioners Stahlin and Bagwell, in their affirmative defenses in the answers filed in the cases, claim the accusations are true. Respondents deny this.

Very definitely, then, there are substantial disputed questions of fact. These cannot be determined on motions for summary judgment under either Michigan Court Rules or the Federal Rules of Civil Procedure. They can only be determined by trial.

CONCLUSION

For the reasons, arguments and authorities hereinabove submitted, Respondents respectfully urge that the petitions for certiorari on behalf of Petitioners The Evening News Association, Martin S. Hayden, John H. Stahlin and Paul D. Bagwell be denied, with costs to these Respondents in their behalf sustained.

Respectfully submitted,

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